

A recent case discussed the elements of proof of possession of a handgun in a vehicle occupied by more than one person. It provides a good discussion of proof of crimes that involve the element of possession of an item and would also apply to possession of other types of contraband.

The facts are that two police officers received a dispatch regarding a complainant who had called the department to report that he had located his previously stolen car and had observed two men sitting in its front seats. The complainant indicated that at one point the driver exited the vehicle and walked up the street while the passenger remained in the vehicle. The officers, who were in separate marked police cars and were both in uniform, drove to the indicated location.

The complainant directed the officers to the vehicle. At this point, the vehicle had occupants in both front seats. One officer approached the driver's side of the vehicle and the other approached the passenger's side. The officers instructed the occupants to put their hands in plain view. The passenger complied, but the defendant, who was seated in the driver's seat, did not comply and repeatedly moved his hands toward the middle of his legs. After the third time that the defendant made such a movement, the officer grabbed him by his left arm and pulled him from the vehicle. A handgun was observed on the front seat where the defendant had been seated and was secured. The defendant was charged with, along with other crimes, carrying a handgun without a license.

To prove this crime, the State must prove that the defendant had either actual or constructive possession of the handgun. To show actual possession, the State must show that the defendant had "direct physical control" over the handgun. When proceeding on a theory of constructive possession, the State must show that the defendant had "both the intent and capability to maintain dominion and control over the handgun." Such a showing involves showing the defendant had knowledge of the handgun's presence.

One of the State's arguments was that the defendant had actual possession of the handgun because he was sitting on it. In the State's view, sitting on the gun clearly demonstrated direct physical control over the gun. However, the court of appeals noted that no prior Indiana case has held that the act of sitting on an object constitutes physical control or actual possession, and it refused to do so. However, the act of sitting on contraband is a factor favoring a conclusion of constructive possession.

The court noted five types of evidence the State may use to demonstrate constructive possession of a handgun: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) proximity of the firearm to the defendant; (4) location of the firearm within the defendant's plain view; and (5) the mingling of a firearm with other items owned by the defendant.

In order to show that the defendant "carried" the handgun in the vehicle, it is not necessary to prove that he actually drove the vehicle that contained the handgun. However, at a minimum, the State must offer evidence of an intention to convey or transport the weapon from one place to another. Here, the defendant was sitting in the driver's seat of the vehicle in which police found the handgun. The keys were in the ignition, and the vehicle was parked on the street. This evidence permitted the inference that he recently drove the vehicle or had the intent to drive the vehicle.

The court also noted that there was sufficient evidence to support the defendant's conviction regardless whether he transported the gun in the vehicle. Indiana courts are likely to find sufficient evidence where a vehicle's passenger could see the handgun, was in the best position to access the gun, and no evidence indicates the gun belonged to or was under the control of another occupant of the vehicle. Here, the defendant was in the best position to exercise control over the gun, and there was no evidence the gun belonged to the passenger. Also, the defendant's acts of moving his hands toward his legs, resisting arrest, and fleeing are factors in favor of finding constructive possession.

Case Name: *Deshaizer v. State*, 877 N.E.2d 200 (Ind. Ct. App. 2007), *trans. denied*.